IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

MONDAY, THE 1ST JANUARY 2007 / 11TH PAUSHA 1928

CRL.A.No. 1068 of 2005()

SC.148/1996 of ADDL. SESSIONS COURT FAST TRACK (ADHOC) NO.II, THIRUVANANTHAPURAM
.....

APPELLANT: 1ST ACCUSED:

BABY JOHN, S/O. GAMALIYEL,
ROADARIKATHUPUTHENVEEDU, KAPPIVILA,
MALAYINKEZHU VILLAGE, MALAYINKEEZHU DESOM.

BY ADV. SRI.R.RAJESH KORMATH
SMT.PREETHY KARUNAKARAN
SMT.MEENA.A.
SMT.M.R.MINI
SMT.SANJANA R.NAIR
SRI.V.S.ROBIN

RESPONDENTS: COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
C.I. OF POLICE , KATTAKADA, IN CRIME
NO.10/94 OF MALAYINKEEZHU POLICE STATION,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVIN G BEEN FINALLY HEARD ON 01/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.P.BALACHANDRAN,JJ.

Criminal Appeal No.1068 OF 2005

Dated 1st January, 2007

JUDGMENT

Koshy,J.

The accused, two in number, were charge sheeted for offences punishable under sections 323, 324 and 302 read with section 34 of the Indian Penal Code for committing murder of one Antony and for inflicting injuries on his son (PW2) and brother (PW3). Before starting of the trial, A2 died. The Sessions Court found A1 guilty for offences punishable under section 302 as well as 324 IPC and convicted them thereunder. Against the above conviction and sentence this appeal was filed.

2. According to the prosecution, deceased Antony was the father of PW1 and PW2 and the elder brother of PW3. Wife of the deceased Antony was undergoing treatment in the Medical College Hospital, Thiruvananthapuram. On 13.1.1994 at about 2.15 p.m. deceased Antony left from his house for making arrangements for the operation of his wife. While he was waiting in front of the shop of CW10 Surendran near Anthiyoorkonam junction for boarding in the bus to Medical College, A1 Baby John demanded the money which deceased owed to him and in the ensued altercation, A1 hit at the head of deceased Antony with a piece of granite stone as a result of which deceased Antony fell down unconscious with bleeding wound. At that time, A2 Babu, the brother of A1 stamped at

the abdomen of the deceased. A1 hit with the same stone at the left side of the head of PW2 and behind the left ear of PW3 who rushed to the spot and intercepted the accused. On seeing CW4 Sathyadas and others rushing to the spot the accused ran away towards west after leaving the stone used for hitting the deceased and witnesses. Thereafter the deceased, PW2 and PW3 were taken to Taluk Head Quarters Hospital, Neyyattinkara and from there to the Medical College Hospital, Thiruvananthapuram. Antony succumbed to injuries at 2 p.m. on 18.2.1994.

3. PW1, son of the deceased Antony, gave Ext.P1 F.I. Statement before death of Antony when he saw him in the hospital. Since he has not seen the occurrence, PWs 2, 3 and 7 were examined as eye witnesses. PW2 is another son and PW3 is the brother of the deceased. According to them, they saw the first accused holding in the linen of deceased Antony and hitting at his head with a granite stone as a result of which he fell down unconscious. At that time, the second accused stamped at his chest. It is at that time PW3 rushed to the spot and attempted to lift deceased Antony in his hands and the accused (A1) hit behind his left ear with the same stone as a result of which PW3 also fell down. Thereafter the accused hit at the head and forehead of PW2 who held PW3 in his hands. Exhibits P3

and P4 are the wound certificates of PW3 and PW2 respectively issued by PW4 doctor. The alleged cause of injury noted by PW4 doctor in Exts.P3 and P4 wound certificates is `hit by granite stone'. Evidence of PWs 2 and 3 would show that any reason whatsoever, A1 followed by A2 attacked Antony and when they went there, they also sustained injuries. According to the defence, PWs 2 and 3 attacked A2 and when A1 tried to intervene, they also sustained injuries. Then the father of PW2 rushed towards the place and interfered in the dispute and accidentally he also sustained injuries by stone and being of old age, after a month's treatment he died. It is the case of the accused that they have not intentionally caused any hurt on the deceased. This is the version given by the accused in the statement under section 313 of the Code of Criminal Procedure also. It is further contended that PWs 2 and 3 are highly interested witnesses. A criminal case was registered against PWs 2 and 3 for inflicting injuries on A1 and A2 and that was tried as S.C.No.360 of 2004. Apart from the close relationship, they are further interested in the fact that they want an acquittal in that case and, therefore, their evidence has to be scrutinized carefully to find out the truth. It was also pointed out that admittedly the incident occurred in front of the shop of Surendran, but, he was not examined. Apart from PW7, no

other independent witnesses were examined even though the incident is alleged to have occurred in a junction near the bus stop. PW3 stated before the Investigating Officer that there was an altercation between PW2, A1 and A2. This was marked through Investigating Officer as Ext.D1. PW3 also stated that when he saw Antony he was lying injured sustaining head injury. This shows that he has not actually seen the incident. PW3 also admitted that he had taken toddy before the incident. Wound certificate issued to PW3 also shows that when he was examined by the doctor there was strong smell of alcohol. It is also admitted by PW2 that he is one of the accused in the counter case along with PW3.

4. Now we will come to the evidence of PW7 who is another independent witness. According to him, he incidentally came to that place and saw the occurrence and has deposed similarly as by PWs 2 and 3, but, he was not aware of their names. However, cross examination of PW7 as well as evidence of Investigating Officer show that there was altercation between A1, A2 and PW2 and incident occurred while deceased Antony went to interfere.

5. DW1 Dr.Raveendran was examined to prove the injuries of A1 which is admittedly caused during the course of the same incident. Ext.D3 shows that in the incident A1 sustained stab injury on the right lumbar region and he was admitted in the hospital on 13.1.1994 and discharged on 28.1.1994 which shows that he was conservatively treated and discharged. Ext.P2 wound certificate shows that the following injuries were sustained by the deceased:

> "Lacerated injury 2x.5x.5cm over the vertex
> Bleeding from mouth & Head injury."

Ext.P2 wound certificate was issued by PW4 doctor. PW5 Doctor conducted post mortem and issued Ext.P5 certificate which shows that the deceased sustained the following injuries:

> "INJURIES (ANTE-MORTEM)
>
> 1. Pale soft bone deep scar 2.5x1cm on the top of head 2.5cm to the left of midline and 11cm above the top of left ear. Surrounding scalp tissue over an area 7x6cm infiltrated with blood (brownish black in colour). Bank portion of the sagittal suture showed fracture separation extending as fissured fracture of occipital bone extending to foramen magnum. Ventricles of brain dilated and contained cerebrospinal fluid reddish brown in colour. Base of left temporal

and frontal lobes of brain showed haemorrhagic necrosis. Brain showed signs of raised intracranial tension.

2. Infected bed sore 5x3cm on the ....."

According to the doctor, death was due to head injury. Doctor did not certify or depose that injury inflicted was sufficient to cause death. He also deposed as follows:

"The post mortem on the body of the deceased was conducted after a month prolonged treatment of the patient in the Hospital.

The finding of blood stained froth in the Air passage could indicate Septic pneumonia. But there was no evidence of septic pneumonia in this case and the Lungs were congested and oedematous. This is seen in any terminal death and that also can resulted blood stained froth in the air passages. In old age anteriocerosis can develop. Such old age changes were also present in this case. The original injury caused was subsequently healed. By a forcible fall the fracture noted on scalp can be caused depending on the fall. Slight injury on head can cause cerebral haemorrhage. A fall can cause haemorrhage. Subdural and subarachnoid haemorrhage shows sequential colour change after the initial haemorrhage. During the treatment also depending on the period elapsed the colour changes can occur. In this case there had colour change. I have not seen the patient while he was alive."

6. Evidence of the eye witnesses examined would show that there was an altercation between A1, A2 and PW2 as well as the deceased. A1, PW2, PW3 as well as the deceased sustained injuries. It is also pertinent to note that it was not a pre-planned attack. The weapon used was only a granite stone which was available in the road and injuries on PW2, PW3 as well as deceased were with the stone and not with any weapon like knife, dagger etc. Whereas A1 sustained stab injury. It shows that in the free fight deceased as well as PW2 and PW3 sustained injuries, but, injury No.1 was very serious. The deceased was aged more than 70. He had undergone treatment for about 37 days and he had bed sore also when he succumbed to the injuries. In these circumstances, we are of the opinion that A1 cannot be convicted under section 302 I.P.C. A1 also sustained injuries and there was fight between deceased, PW2 etc. on one side and accused on the other side. It was not a pre-planned attack and intention to kill and intention to inflict an injury likely to cause death cannot be gathered from the evidence adduced in this case. Considering the nature of injuries inflicted on the deceased Antony by the accused, nature of weapons used etc., he can be convicted only under section 326 I.P.C. and not under section 302 I.P.C. From the evidence of this

case, we are of the opinion that sentence of three years rigorous imprisonment and a fine of Rs.5,000/= would be sufficient punishment. Hence, the conviction and sentence of A1 under section 302 IPC are set aside and he is convicted under section 326 IPC and sentenced to undergo rigorous imprisonment for three years and Rs.5,000/= as fine. In default of payment of fine he should undergo imprisonment for another three months. Sessions Court has convicted and sentenced A1 under section 324 IPC to undergo rigorous imprisonment for one and a half years and there was a direction to undergo imprisonment concurrently. Sine he has to undergo imprisonment concurrently, we are not interfering with the conviction and sentence imposed under section 324 IPC. A1 is also entitled to the right of set off.

The appeal is partly allowed.

J.B.KOSHY
JUDGE

K.P.BALACHANDRAN
JUDGE

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